UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

FREEDOM OF INFORMATION ACT BRANCH

Washington, D.C. 20570

Via email

July 8, 2019

Chris Brooks
MuckRock News
411A Highland Ave.
DEPT MR 58171
Somerville, MA 02144

Re: FOIA Case No. NLRB-2018-001094

Dear Mr. Brooks:

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received in this Office on July 16, 2018, in which you requested "[a]ny and all materials related to the International Association of Machinists at the Vought Aircraft Industries/Boeing plant in Charleston, South Carolina from January 1, 2007 to the present." You agreed to assume financial responsibility for the processing of your requests in the amount of $37.00.

We acknowledged your request on July 16, 2018. We appreciate your patience and regret the delay in our final response.

In an email communication from a member of the FOIA staff on August 1, 2018, you were initially informed that this request, NLRB-2018-001094, would be processed with your other FOIA request (NLRB-2018-001093), as they appeared to seek overlapping information. You were also informed that your requests, as written, were very broad and covered a voluminous amount of records in over thirty separate case files. In response to the FOIA staff member's suggestion that you consider narrowing the scope of your requests, you agreed to do so, by email, on August 3 and 8, 2018. With respect to NLRB-2018-001094, you clarified that you were interested in "materials related to the decertification election," including "a vote tally, any vote stipulations, and any other materials that shed light on what was happening in the plant and with the union leading up to the decertification vote." Given the narrowed request for records relating to the Vought plant, it was decided that your requests would be processed separately. Accordingly, this response pertains only to NLRB-2018-001094.

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Pursuant to the FOIA, a reasonable search for responsive records was conducted in our electronic casehandling system, NxGen, by searching for the specified company name,

Vought Aircraft Industries ("Vought Industries"). That searched identified the following eight cases involving Vought Industries: 11-RC-006679, 11-CA-021991, 11-CA-022073, 11-CA-022091, 11-CB-003993, 11-CA-022413, 11-CA-022416 and 11-RD-000723.

Our electronic search revealed that these eight cases all closed in or before 2009, and as a result, limited case records are available because most of those files were destroyed pursuant to the Agency's file disposition and retention policy. Under this policy, case files are retained for a 6-year period, which commences at the close of the calendar year during which the case closed. The files are then destroyed unless they are selected for permanent retention based on their legal significance. None of the eight cases were selected for permanent retention, and all were closed more than six years ago. However, the search did find a limited number of responsive records still maintained in our electronic casehandling system.

An additional search inquiry was also directed to our Region 11 Office for any paper records which may have been maintained by that office. Staff in that office conducted a search, and that search located some paper records that were still maintained by the Region related to Case Nos. 11-CA-021991 and 11-RD-000723.

Finally, a further search of our electronic system was conducted through Integrated Search, or "iSearch," the Agency's custom document search tool, using search terms, to attempt to identify any other records which referenced the decertification election at Vought Industries. This search yielded responsive records from one case - *International Association of Machinists & Aerospace Workers District Lodge 751 and International Association of Machinists & Aerospace Workers*, No. 11-CB-004313 *et al*.

As a result of these searches, 203 pages of releasable records were identified as responsive to your clarified request. After a thorough review of the responsive records, I have determined that portions are exempt from disclosure under Exemptions 5, 6, and 7(C) of the FOIA (5 U.S.C. § 552(b)(5), (b)(6), and (b)(7)(C)). These records are being provided to you either in their entirety or partially redacted to the extent they were found to be reasonably segregable from the exempt portions of the records. Other responsive records yielded from the search are being withheld in their entirety pursuant to FOIA Exemptions 4, 5, 6, 7(C), and 7(D) (5 U.S.C. § 552(b)(4), (b)(5), (b)(6), (b)(7)(C), and (b)(7)(D)). Your request is, therefore, granted in part and denied in part, as explained more fully below.

Regarding the records being withheld, 60 pages are withheld pursuant to Exemption 5, 5 U.S.C. § 552(b)(5), including internal agency memoranda, investigative reports and recommendations, and Board agent case file notes.

Exemption 5 allows agencies to withhold "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency," and covers records that would "normally be privileged in the civil discovery context." *NLRB v. Sears, Roebuck & Co*., 421 U.S. 132, 149 (1975); *Tax*

Analysts v. IRS, 117 F.3d 607, 616 (D.C. Cir. 1997). Exemption 5 is designed to protect and promote the objectives of fostering frank deliberation and consultation within an agency and to prevent a premature disclosure that could disrupt and harm the agency's decision-making process. *Id*. at 150-152. The deliberative process and the attorney work-product privileges are two of the primary privileges incorporated into Exemption 5. The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP,* 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep't. of Justice*, 591 F.2d 753, 772 (D.C. Cir.1978).

Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.,* prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.,* 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA,* 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.,* "it must form a part of the agency's deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not "identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." *Sears, Roebuck & Co.,* 421 U.S. at 151 n.18 (1975). Moreover, the protected status of a predecisional record is not altered by the subsequent issuance of a decision, *see, e.g.*, *Fed. Open Mkt. Comm. v. Merrill*, 443 U.S. 340, 360 (1979); *Elec. Privacy Info. Ctr. v. DHS*, 384 F. Supp. 2d 100, 112-13 (D.D.C. 2005) or by the agency opting not to make a decision. *See Judicial Watch, Inc. v. Clinton*, 880 F. Supp. 1, 13 (D.D.C. 1995), *aff'd,* 76 F.3d 1232 (D.C. Cir. 1996) (citing *Russell v. U.S. Dep't of the Air Force*, 682 F.2d 1045 (D.C. Cir. 1982).

The attorney work-product privilege protects records and other memoranda that reveal an attorney's mental impressions and legal theories that were prepared by an attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. *See United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. *See FTC v. Grolier*, *Inc.,* 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.* The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB,* 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation

of litigation, not just the portions concerning opinions and legal theories, *see Judicial Watch v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.; see also Wolfson v. United States,* 672 F. Supp.2d 20, 29 (D.D.C. 2009). *See Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product).

Here, the responsive records being withheld meet the requirements for Exemption 5 protection under both the deliberative process and attorney work-product privileges. They are internal and predecisional. They reflect the views of the General Counsel and his Regional staff concerning prosecutorial policies and strategies in the processing of the identified representation and unfair labor practice cases. Since they analyze various legal theories and strategies, these internal casehandling records clearly reflect the deliberative and consultative process of the Agency that Exemption 5 protects from forced disclosure*. Sears, Roebuck and Co.*, 421 U.S. at 150-52. Additionally, the content of the records is also attorney work-product, as it reflects legal analysis and opinions of the General Counsel's staff created to assist superiors in their decision-making process, in anticipation of possible litigation. Accordingly, the records are being withheld in their entirety. Please note a few redactions have also been made to the attached records pursuant to Exemption 5, in order to protect advice, opinions and recommendations that are part of the Agency's consultative and decision-making process.

Other investigatory records, totaling 126 pages, are being withheld in their entirety, under FOIA Exemptions 6 and 7(C) and 7(D), since their disclosure could constitute an unwarranted invasion of privacy and/or reveal a confidential source.
5 U.S.C. §§ 552(b)(6), (b)(7)(C) and (b)(7)(D). In addition, certain redactions have been made to portions of the attached records pursuant to Exemptions 6 and 7(C) to protect the privacy interests of individuals named in the case files.

Exemption 6 permits agencies to withhold information about individuals in "personnel and medical and similar files" where the disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review,* 830 F.3d 667, 673 (D.C. Cir. 2016). The "files" requirement covers all information that "applies to a particular individual." *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601-02 (1982). *See also Judicial Watch, Inc. v. FDA,* 449 F.3d 141, 198-199 (D.C. Cir. 2006) (Exemption 6 should be "read . . . to exempt not just files, but also bits of personal information, such as names and addresses"). Exemption 7(C) permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information "could reasonably be expected to constitute an unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(7)(C); *U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989).

Application of Exemptions 6 and 7(C) requires a two-part balancing test that considers the following factors: (1) whether there is a legitimate personal privacy interest in the requested information, and, if so; (2) whether there is a countervailing public interest in disclosure that outweighs the privacy interest. *Judicial Watch, Inc. v. Nat'l Archives & Records Admin.*, 214 F. Supp. 3d 43, 58 (D.D.C. 2016), *aff'd,* 876 F.3d 346 (D.C. Cir. 2017), citing *Nat'l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004).

With respect to the first factor, the Supreme Court has described Exemptions 6 and 7(C) as reflecting privacy interests in "avoiding disclosure of personal matters," *Reporters Comm*., 489 U.S. at 762, maintaining the "individual's control of information concerning his or her person," *id.* at 763, avoiding "disclosure of records containing personal details about private citizens," *id.* at 766, and "keeping personal facts away from the public eye," *id*. at 769. Disclosures that would subject individuals to possible embarrassment, harassment, or the risk of mistreatment also constitute intrusions into privacy under Exemptions 6 and 7(C). *See Cameranesi v. United States Dep't of Defense*, 856 F.3d 626, 638 (9th Cir. 2017), citing *U.S. Dep't of State v. Ray*, 502 U.S. 154, 176-177 (1991). Consistent with these concerns, privacy interests have been recognized for individuals named in a law enforcement investigation, including third parties mentioned in investigatory files, as well as witnesses and informants who provide information during the course of an investigation. *See Rugiero v. U.S. Dep't of Justice*, 257 F.3d 534, 552 (6th Cir. 2001); *Nation Magazine v. U.S. Customs Serv*., 71 F.3d 885, 894 (D.C. Cir. 1995); and *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985 (9th Cir. 1985).

The redacted information in the attached records, as well as the 126 pages of withheld records, are exempt from disclosure under the above balancing test. The withheld records consist, in part, of employee voter lists and union sign-in sheets. These withheld records are maintained in investigative files created by the Agency for the purpose of enforcing the Act and contain individuals' names and other identifying information that fit squarely within the types of privacy interests that Exemption 6 and 7(C) were intended to protect from disclosure. With respect to the voter lists and sign-in sheets specifically, such records are compilations of private information on employees which alone do not reveal anything about the Board's performance of its duties. *See Reed v. NLRB*, 927 F.2d 1249, 1251 (D.C. Cir. 1991) (affirming denial of request for disclosure of [voter] lists, stating that the lists at issue contain exclusively private information and would reveal nothing about the Board's conduct of representation proceedings or any other statutory duty); *Reporters Committee,* 489 U.S. at 773 (compilations of information on private individuals reveal little about government conduct). By contrast, I perceive no countervailing public interest in disclosure. The public's interest in disclosure depends on "the extent to which disclosure would serve the 'core purpose of the FOIA,' which is 'contribut[ing] significantly to public understanding *of the operations or activities of the government*.'" *U.S. Dep't of Def. v. Fed. Labor Relations Auth*., 510 U.S. 487, 495 (1994) (emphasis in original), *quoting Reporters Comm*., 489 U.S. at 775. As the Supreme Court further explained in *Nat'l Archives & Records Admin.,* 541 U.S. at 172, to defeat a privacy interest there must be some indication that the "public interest

sought to be advanced is a significant one, an interest more specific than having the information for its own sake. . . [and that] the information is likely to advance that interest." No such public interest is evident here that outweighs the private interests identified above.

In addition, Exemption 7(D) permits an agency to withhold records or information compiled for law enforcement purposes that "could reasonably be expected to disclose the identity of a confidential source . . ." 5 U.S.C. § 552(b)(7)(D). A "source" is considered confidential if he or she "provided information under an express assurance of confidentiality or in circumstances from which such an assurance could reasonably be inferred." *See U.S. Dep't of Justice v. Landano,* 508 U.S. 165, 172 (1993). Exemption 7(D) permits withholding any information furnished by a source that might disclose or point to his or her identity. *See Radowich v. U.S. Attorney, Dist. of Md*., 658 F.2d 957, 960 n.10 (4th Cir. 1981). One of the purposes underlying Exemption 7(D) is to "encourage cooperation with law enforcement agencies by enabling the agencies to keep their informants' identities confidential." *United Technologies Corp. v. NLRB*, 777 F.2d 90, 94 (2d Cir. 1985). This is "particularly important to agencies, such as the NLRB, . . . [which] must depend on the information provided by the charging party and its witnesses" who are often the "sole source of the Board's information in unfair labor practice cases." *Id.* ("An employee-informant's fear of employer retaliation can give rise to a justified expectation of confidentiality."). Significantly, a source's identity can be withheld under Exemption 7(D) even if his or her identity is or becomes known through other means. *See, e.g., Jones v. FBI,* 41 F.3d 238, 248-49 (6th Cir. 1994); *Ferguson v. F.B.I.,* 957 F.2d 1059, 1068-69 (2d Cir.1992) (Exemption 7(D) protection is available even if the source has testified at a hearing or the information provided by the source has otherwise been made public); *Lesar v. U.S. Dep't of Justice*, 636 F.2d 472, 491-92 (D.C. Cir. 1980); *Ortiz v. Dep't of Health and Human Serv*., 70 F.3d 729, 733 (2d Cir. 1995); *United Technologies*, 777 F.2d at 95. Moreover, Exemption 7(D) protection is not diminished by the fact that a charging party may ultimately withdraw his or her claim, or if the investigation or case has otherwise been closed. *Ortiz*, 70 F.3d at 733. Any affidavits which may be in the responsive case files would contain information provided to the Agency under an express promise of confidentiality, and are exempt from disclosure under Exemption 7(D).

Finally, we are withholding six pages pursuant to FOIA Exemption 4, 5 U.S.C. § 552(b)(4). Specifically, the withheld record is an incident report detailing technical and proprietary information about Vought's operations. This record was voluntarily submitted to the Agency during the Region's investigation of an unfair labor practice charge and includes information that the submitter keeps private and does not customarily release to the public. Therefore, we are withholding the incident report as confidential, "commercial or financial information" that is exempt from disclosure under Exemption 4. *See Food Marketing Inst. v. Argus Leader Media*, --- S.Ct. ---- 2019 WL 2570624, at *7 (June 24, 2019) (SNAP data from individual grocery retailers found to be "confidential" within meaning of Exemption 4 as requested information was treated as private by its owners and provided to the government under an assurance of privacy). *See also Pub.*

Citizen Health Research Grp. v. FDA, 704 F.2d 1280, 1290 (D.C. Cir. 1983) ("[R]ecords that actually reveal basic commercial operations, such as sales statistics, profits and losses, and inventories, or relate to the income-producing aspects of a business" contain commercial information); *New Hampshire Right to Life v. U.S. Dep't of Health & Human Servs.*, 778 F.3d 43, 50-51 (1st Cir. 2015) (holding that documents outlining an organization's operations, including how it produces services for sale, were exempt from disclosure under Exemption 4); *100Reporters LLC v. U.S. Dep't of Justice*, 248 F. Supp. 3d 115, 137, 144-45 (D.D.C. 2017) (company's internal training presentations, training modules, and other related materials found to be commercial information subject to withholding under Exemption 4).

For the purpose of assessing fees, we have placed you in Category C, as a representative of the news media, in that you qualify as a person "actively gathering news for an entity that is organized and operated to publish or broadcast news to the public." NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(vii). Accordingly, there is no charge assessed for this request.

You may contact Marissa Wagner, the FOIA Attorney who processed your request, at (202) 273-2957 or by email at marissa.wagner@nlrb.gov, as well as the Agency's FOIA Public Liaison, Patricia A. Weth, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Specialist or Attorney-Advisor, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the Agency's FOIA Public Liaison is:

Patricia A. Weth
FOIA Public Liaison
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: FOIAPublicLiaison@nlrb.gov
Telephone: (202) 273-0902
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services
National Archives and Records Administration
8601 Adelphi Road-OGIS
College Park, Maryland 20740-6001
Email: ogis@nara.gov

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Telephone: (202) 741-5770
Toll free: (877) 684-6448
Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at: https://foiaonline.gov/foiaonline/action/public/home or by mail or email at:

Chief FOIA Officer
National Labor Relations Board
1015 Half Street, S.E., 4th Floor
Washington, D.C. 20570
Email: DLCFOIAAppeal@nlrb.gov

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the FOIA Specialist, Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

/s/ *Synta E. Keeling*

Synta E. Keeling
Freedom of Information Act Officer

Attachment: (203 pages)